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GI Plum Holdco, LLC; and Quince Holdings
9 LLC dba Pueblo Springs Rehabilitation Center

10
11 UNITED STATES DISTRICT COURT
12 SOUTHERN DISTRICT OF CALIFORNIA

13 PLUM HEALTHCARE GROUP, LLC,)
etc., et al.,)

14 Plaintiffs,)

15 v.)

16 ONE BEACON PROFESSIONAL)
17 INSURANCE, etc., et al.,)

18 Defendants.)

CASE NO. 15CV2747W MDD

PLAINTIFFS' OBJECTIONS TO
AND MOTION TO STRIKE
SUPPLEMENTAL
DECLARATION OF MATTHEW
ELSTEIN IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT OR
PARTIAL SUMMARY
JUDGMENT

19 Date: April 24, 2017

20 Judge Thomas J. Whelan

21 **[NO ORAL ARGUMENT**
22 **PURSUANT TO LOCAL RULE]**

Pursuant to FRCP Rule 56(c)(2), Plaintiffs object to the Supplemental Declaration of Matthew Elstein, and Exhibit A attached thereto, in support of their motion for summary judgment or partial summary judgment on the following grounds:

1. Plaintiffs object to the entirety of Mr. Elstein's supplemental declaration and Exhibit A, which was purportedly submitted to prove defendants timely responded to plaintiffs' first set of requests for admission. As a preliminary matter, defendants are required to file a motion for relief from default for failing to timely respond to plaintiffs' requests for admission. Relief cannot be granted simply by filing Mr. Elstein's supplemental declaration. FRCP 36(b); **999 v. C.I.T. Corp.** (9th Cir. 1985) 776 F.2d 866, 869; **Quasius v. Schwan Food Co.** (8th Cir. 2010) 596 F.3d 947, 952.

Further, Mr. Elstein's declaration contradicts the proof of service which was purportedly signed under penalty of perjury by Sharlen Campbell. Mr. Elstein now claims he was the person who placed the envelopes addressed to plaintiffs' counsel at two different addresses in the mail room. (1:14-18.) The proof of service, signed under penalty of perjury by Sharlen Campbell, claims she was the one "placing a true copy thereof in a sealed envelope addressed as above, and **placing it for collection and mailing following ordinary business practices.**" (See Exhibit A, pg. 9.) (Emphasis added.)

Thus, the two declarations, both under penalty of perjury, contradict each other. Parties are judicially estopped from taking opposition positions. **Hamilton v. State Farm Mut. Ins. Co.** (9th Cir. 2001) 270 F.3d 778, 782-85. Therefore, both Mr. Elstein's declaration, and Exhibit A with the proof of service signed by Sharlen Campbell, should be rejected.

1 Finally, defendants and Mr. Elstein both fail to address either the letter
2 plaintiffs' counsel mailed on February 17, 2017, alerting defendants to
3 their failure to timely respond to plaintiffs' requests for admission (Huver
4 Dec., ¶13, and Exhibit 11, pg. 195), or the e-mail sent February 22, 2017,
5 following a face-to-face conversation wherein Mr. Elstein blamed his
6 secretary for failing to timely mail the responses. (Huver Dec., ¶14). The
7 February 22nd e-mail confirmed Mr. Elstein's statement that his
8 "secretarial situation has been a 'revolving door' and that may have been
9 the reason" plaintiffs did not receive either the designation of a rebuttal
10 expert or the responses to requests for admission, each of which Mr.
11 Elstein claimed were separately mailed one week apart. Mr. Elstein never
12 refuted the e-mail confirmation.

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14 Defendants and Mr. Elstein now admit that, despite his representations to
15 the contrary during that same February 22nd face-to-face meeting, Mr.
16 Elstein never did serve the rebuttal expert designation. Defendants have
17 requested that Magistrate Judge Dembin grant them relief by reopening
18 discovery so they can designate the rebuttal expert Mr. Elstein also
19 claimed he "served" in February 2017. Perhaps this is the basis for
20 defendants' cryptic disclaimer about vouching for Mr. Elstein's credibility
21 in their reply papers. (Footnote 1, pg. 6.)

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1 Regardless, defendants cannot selectively choose which statements of Mr.
2 Elstein they choose to “believe” and which they reject as false. Likewise,
3 two people cannot represent under oath that they performed the same task.
4 One of them is not telling the truth.

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6 Respectfully submitted,
7 THE HUVER LAW FIRM
8 and
9 HARRIS I. STEINBERG, ESQ.

10 DATED: April 18, 2017

11 By: /s/ Richard Huver
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13 Attorneys for Plaintiffs
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